Petition

81-1946

Supreme Court, U.S.
FILED
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CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

RICHARD D. CLARK d/b/a RICHARD CLARK CONSTRUCTION, RONALD L. CLARK d/b/a RONALD CLARK CONSTRUCTION CO., a/k/a R.C.R CONSTRUCTION (referred to as Employers),

Petitioners,

v.

RYCHEN PADDACK, ARTHUR J. DARLING, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, FRANK B. HASTIE, JR., V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare, Pension and Vacation Savings Trust Funds, and RYCHEN PADDACK, LEO GRIFFITHS, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, and RONALD L. ANDERSON, as Trustees for the Oregon-Washington Carpenters-Employers Apprenticeship and training Trust Fund,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
And Appendix to Petition

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RICHARD D. CLARK d/b/a RICHARD CLARK CONSTRUCTION, RONALD L. CLARK d/b/a RONALD CLARK CONSTRUCTION CO., a/k/a R.C.R CONSTRUCTION (referred to as Employers),

Petitioners,

v.

RYCHEN PADDACK, ARTHUR J. DARLING, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, FRANK B. HASTIE, JR., V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare, Pension and Vacation Savings Trust Funds, and RYCHEN PADDACK, LEO GRIFFITHS, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, and RONALD L. ANDERSON, as Trustees for the Oregon-Washington Carpenters-Employers Apprenticeship and training Trust Fund,

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QUESTIONS PRESENTED 1/

1. Is a prehire contract enforcible where the union never represented any of the employees at the project in question, and none of the employees are transferred from project to project?

2. Does a contractor have an obligation to repudiate a prehire contract prior to a legal action to enforce the contract?

3. Does failure to honor or apply any of the terms of a prehire contract at job projects constitute repudiation of that contract, or is a contractor required to give clear verbal or written notice to the union of repudiation, prior to the filing of a court action to enforce the contract?

1/ A listing of names of all parties to this proceeding is included in the caption of the case.

Richard D. Clark *et al*, Petitioners herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above entitled cause on March 2, 1982.

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OPINIONS BELOW

1. The Court of Appeals for the Ninth Circuit reversed the decision of the district court on March 2, 1982. The opinion is reported as _____ F2d _____, and is reproduced herein as "Appendix A" to this Petition.

2. Honorable Robert C. Belloni, Judge, United States District Court for the District of Oregon, issued his opinion granting judgment for defendants (Petititoners herein). This opinion, reported at _____ F. Supp. _____ is reproduced herein as "Appendix B" to this Petition.

GROUNDS FOR JURISDICTION IN THIS COURT

The Opinion below was dated and entered on March 2, 1982. The Petitioners herein then filed with the Ninth Circuit a motion to stay the mandate of the Court. This motion was granted.

The Opinion below decides and applies an important question of federal law contrary to decisions of other Courts of Appeals and to many decisions of District Courts and to State courts, and it may be contrary to this Court's decision in *NLRB v. Iron Workers*, 434 U.S. 335 (1978). The Opinion presents an important question of first impression, which until now has not been, but ought to be, decided by this Court. On this basis, petition is made to this Court pursuant to 28 U.S.C.A. Section 1254 and U.S. Supreme Court Rule 17, for certiorari to review the opinion below.

An order for stay of the mandate of the Ninth Circuit has been granted for an extension of time in which to petition for Certiorari, until April 22, 1982.

STATUTES INVOLVED

The statutes involved in the cause are contained within the Labor Management Relations Act, as amended, 29 U.S.C. secs. 141 *et seq.*, (hereinafter referred to as the "Act"), Sections 7; 8 (a); 8 (a) (5); 8 (b); 8 (b) (1) (A), 8 (b) (2), 8 (b) (7); 8 (b) (7) (C); 8 (f); 301 (a); and 302 (a) (c) (d), as well as Federal Rules of Civil Procedure 52 (a). The statutes cited, in pertinent part, are printed verbatim and are reproduced herein as Appendix "C" to this Petition.

STATEMENT OF THE CASE

(a) BASIS FOR FEDERAL JURISDICTION IN FIRST INSTANCE

The action herein was brought by the Respondent in the circuit court of the State of Oregon by the service of a "complaint in equity for an accounting and for sums found due, breach of collective bargaining agreement." The complaint alleged that the principal plaintiff is a joint labor-management trust fund created pursuant to section 302 (c) of the Act, 29 U.S.C. sec. 186 (c), and that jurisdiction is conferred on the court by section 301 (a) of the Act, and by the trust agreement.

Defendants removed the action to the United States District Court, District of Oregon, pursuant to the federal removal statute, 28 U.S.C. sec. 1446. 2/

The parties stipulated to the entire record in District Court, in lieu of a trial.

(b) STATEMENT OF FACTS

Briefly, the Petitioners are a small contractor, operating under three names. On August 9, 1977, Petitioner Richard Clark signed a prehire contract with the Oregon State Council of Carpenters (hereinafter "Carpenters"), at a time when he had no employees. Carpenters eventually achieved as members a majority of the carpenters on Defendants' Hilltop Road Project, but Richard Clark never again employed these or any other members of the Carpenters. Richard Clark never enforced any union security clause in his contract.

On August 18, 1972 Petitioner Ronald Clark, brother of Richard Clark, signed a prehire contract with Carpenters, at a time when he had no employees. Ronald Clark never had as an employee any member of Carpenters, and he never enforced any union security clause.

Respondent seeks trust payments only for the period beginning December 1, 1978 and ending May 31, 1979. During that period the only project done by Petitioners was at the Coos Bay, Oregon, Thunderbird Motel, done in the name of RCR, a partnership con-

2/ The Text of sections 301 and 302 of the Act is set forth in Appendix C.

sisting of Richard Clark, Ronald Clark, and their father. On the Coos Bay Project, RCR employed five carpenters, none of whom were members of Carpenters nor hired through the Carpenters hiring hall. None of the terms of the Carpenters contract was applied to these five carpenters.

ARGUMENT FOR GRANTING THE WRIT

It is common in the construction industry for smaller contractors or those who are not members of a nationwide contractor's association, to sign a "compliance" or "short form" contract. The typical short form contract consists of one page of fine print. It purports to bind the contractor to the then current "area contract" of that union and to all successor area contracts, unless it is terminated at a stated time, usually every three years. It also purports to bind the contractor to make payments to the labor-management trusts of that union, for health and welfare, retirement, training, and other purposes. The short form agreement purports to require increases in trust payments as required in the area contract, which is often stated in terms of a certain cents for each hour paid to workers.

Short form contracts are often, as here, signed when the contractor has no employees, or when most of the employees are not members of the union. The signing or honoring of such contracts, in any industry except construction, would constitute an unfair labor practice by the contractor and by the union. The employer would "unlawfully assist" the union, in violation of section 8 (a) (1) and (2) of the Act; the union would restrain and coerce employees in violation of section 8 (b) (1) (A); if the union attempted to enforce the contract's union security clause the union would also violate section 8 (b) (2). 3/ *Garment Workers v. NLRB*, 366 US 731 (1961).

However, in the 1959 amendments to the Act, Congress added section 8 (f). 4/

This Court, in emphasizing that section 8 (f) of the Act is "an exception . . . of limited scope" held in *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335, 345, 348, note 10 (1977), that a prehire contract is no defense for a union where its picketing

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3/ The text of 8 (a) (1), (2) and 8 (b) (2) of the Act is included in Appendix "C".

4/ The text of section 8 (f) of the Act is included in Appendix "C".

would otherwise constitute an unfair labor practice. There a union with a prehire contract picketed a contractor to enforce its contract's union security clause. The National Labor Relations Board (hereinafter "NLRB") held that the picketing was for "recognition" and such picketing for more than 30 days violates section 8 (b) 7 (C) of the Act.

This Court approved the NLRB's position that

> a prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship . . . The employer's duty to bargain and honor the contract is contingent on the union obtaining attaining majority support at the various construction sites. (434 US 335, ...)

Thus, a prehire contract does not become enforcible at a particular job site until the union demonstrates its majority status at that jobsite.

The Court of Appeals for the Ninth Circuit has agreed with the NLRB that in the absence of proof that a contractor has a stable and permanent work force that moves from job to job, and the union obtained a majority among such permanent work force, a prehire contract remains voidable. It can be repudiated by the contractor. *Construction Erectors, Inc. v. NLRB,* 665 F2d 1039, 108 LRRM 3059 (9th Cir. 1981). The Ninth Circuit held in *Precision Striping, Inc. v. NLRB,* 642 F2d 1144, 107 LRRM 2009 (1981) that a prehire contract with a union security clause creates no irrebuttable presumption that the union represents a majority. In its footnote 5, the Ninth Circuit agreed with the Third Circuit's rule that "the prehire contract was deemed binding only at those projects at which the union had secured a majority."

The above line of cases are uniformly applied by the NLRB and courts where it is alleged that the union has committed an unfair labor practice by picketing a contractor who signed a prehire contract.

When we look at cases involving the enforcibility in court of a prehire contract, there is a wide divergence of views.

The Ninth Circuit held in the instant case, and in *Todd v. McNeff,* 667 F2d 800, (1982) that prehire contracts

> are voidable by the employer until the union attains majority support. Until such a repudiation, however, the contract is fully enforcible in action under Section 301 of

the L.M.R.A.

(a) COURTS SPLIT AT LEAST THREE WAYS ON THE ENFORCIBILITY OF PREHIRE CONTRACTS

The Ninth Circuit, in *Todd v. McNeff*, in the following quotation, succinctly summarized the split among the courts on the issue when or whether a prehire contract is enforcible:

> The most restrictive reading of Higdon is that it was only intended to deal with the interface between Sec. 8 (f) and Sec. 8 (b) (7). Under this view, Higdon is only applicable to unfair labor practice cases, and in cases such as this one, brought by trustees of fringe benefit funds for back payments, Sec. 8 (f) agreements are fully enforcable under all circumstances . . . .
>
> The following courts have adopted this reasoning: The Eighth Circuit, Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Associated Wrecking Co., 638 F2d 1128 (8 Cir. 1981); the Tenth Circuit, New Mexico District Council of Carpenters v. The Mayhew Co., 664 F2d 215 (10 Cir. 1981); the Eastern District of Virginia, Eastern District Council of Carpenters v. Blake Construction Co., 457 F. Supp. 825 (1978); and the State of Washington Court of Appeals, Western Washington Cement Masons Health & Security Trust Funds v. Hillis Homes, 26 Wash. App. 224, 612 P2d 436 (1980).
>
> The middle position relies upon the use of the word "voidable" in the Higdon opinion. According to this interpretation, an employer is able to exercise the right of repudiation until the union achieves majority status. A prehire agreement would therefore be fully enforceable until a repudiation, and trustees could recover in a Sec. 301 action contributions accruing prior to the repudiation.
>
> The Eighth Circuit apparently reconsidered the restrictive position taken in Associated Wrecking, and adopted this approach in W. C. James, Inc. v. Oil, Chemical, and Atomic Workers International Union, 646 F2d 1292 (8 Cir. 1981). The Middle District of Florida also espouses this view. Florida Marble Polishers Health & Welfare Trust Fund v. Megahee, 102 L.R.R.M. 2740 (1979).

In addition, two other courts, while rejecting the third interpretation, have found it unnecessary to choose between these first two. Trustees of the Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Co., 509 F. Supp. 1097 (N.D. Ga. 1981); Western Washington Laborers-Employers Health & Security Trust Fund v. Newman, 90 C.C.H. Labor Cases Sec. 12, 379 (W.D. Wash. 1980).

The final view that some courts have taken on this question is that until the union affirmatively demonstrates majority status no contract has been formed, and a repudiation voids the contract ab initio. Some language in Ruttmann, supra, and the N.L.R.B. Hidgon decision (Iron Workers Local 103) [Higdon Construction Co.,], 88 L.R.R.M. 1067 ([1975]) supports this view.

The courts which have taken this stance are a different judge in the Western District of Washington, Western Washington Laborers-Employers Health & Security Trust Fund v. McDowell, 103 L.R.R.M. 2219 (1979); the District of Oregon, Vermeer v. Aloha Contractors, 90 C.C.H. Labor Cases Sec. 12,466 (1980); and the District of the District of Columbia, Washington Area Carpenters Welfare Fund v. Overhead Door Co., 488 F. Supp. 816 (1980).

The Fifth Circuit also refused to enforce a pre-hire agreement prior to a demonstration of majority support. Baton Rouge Building and Construction Trades Council v. E. C. Shafer Construction Co., 657 F2d 806 (5 Cir. 1981).

In addition to the cases cited above by the Ninth Circuit, other courts have taken the view that prehire contracts are not enforcible unless the union can show majority support. These cases include *Chicago Carpenters Pension Fund v. Sorenson,* _____ F. Supp. _____ , 108 LRRM 2988 (US DC ND Ill, Aug. 24, 1981; No. 80-C-2392).

Federal Courts have split into at least three different groupings as to what extent and when prehire contracts are enforcible. The number of courts falling into each grouping is approximately equal. The result is chaos, with no uniformity. Most of the differences are caused by differing interpretations and applications of this Court's decision in *NLRB v. Iron Workers, supra.*

The issue is ripe for review by this Court.

This Court has recently held in *Kaiser Steel Corporation v. Mullins*, _____ U.S. _____, 102 S. Ct. 851, 109 LRRM 2268 (1982), that federal courts have a duty to determine whether a contract violates federal law before enforcing it. There this Court held that a federal court cannot enforce a contract's requirement to make trust payments where the issue has been properly raised as to whether that contract violates section 8 (e) of the Act. In the instant case the contractor has properly raised the issue as to whether the prehire contract is enforcible under this Court's *NLRB v. Iron Workers, supra*, decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DATED this 19th day of April, 1982.

s/ Wesley M. Wilson

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APPENDIX TO

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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APPENDIX "A"
(Filed March 2, 1982, Clerk, U.S. Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RYCHEN PADDACK, ARTHUR J. DARLING, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, FRANK B. HASTIE, JR., V.A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare, Pension and Vacation Savings Trust Funds, and RYCHEN PADDACK, LEO GRIFFITHS, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, V.A. HARDING, ALLEN RETTMANN, HAROLD HANSEN, and RONALD L. ANDERSON, as Trustees for the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund.		
Plaintiffs-Appellants,		
vs.		
RICHARD D. CLARK, doing business as RICHARD CLARK CONSTRUCTION, RONALD L. CLARK, doing business as RONALD CLARK CONSTRUCTION CO., also known as R.C.R. CONSTRUCTION		
Defendants - Appellees.		

No. 80-3380

D.C. No. C79-376

MEMORANDUM

Appeal from the United States District Court
for the District of Oregon
Robert C. Belloni, U. S. District Judge, Presiding
Argued and Submitted July 16, 1981

Before: ANDERSON, NELSON and NORRIS, Circuit Judges.

The district court granted appellees' motion for summary judgment, concluding that the prehire agreements were "unenforceable

against defendants with regard to the Coos Bay project." Since that decision, *Todd v. McNeff*, No. 80-5214, slip op. at 485, 489 (9th Cir. Feb. 8, 1982), has held that § 8 (f) prehire agreements in the construction industry are enforceable until the employer repudiates the agreement. In this case, the district court clearly held that there was no repudiation, stating "defendants took no affirmative action to repudiate the agreements until their attorney gave notice to cancel the agreements effective May 31, 1979." Because we hold that the prehire agreements were enforceable against appellees until May 31, 1979, we reverse and remand for further proceedings.

REVERSED AND REMANDED

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RYCHEN PADDACK, et al., Plaintiffs,	)	
vs.	)	CIVIL NO. 79-376
RICHARD D. CLARK dba Richard Clark Construction, RONALD L. CLARK dba Ronald Clark Construction Co., aka R.C.R. Construction, Defendants.	)	OPINION

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BELLONI, Judge:

Plaintiffs are trustees of certain union fringe benefit trusts. They sue defendant employers for contributions allegedly owed to plaintiffs on behalf of employees working for them. The parties have stipulated to all the relevant facts and have submitted this case to the Court on the record.

Defendants Richard Clark and Ronald Clark are construction contractors. They work independently and also through a partnership with their father, Charles E. Clark. The partnership is known as R.C.R. Construction and it also is a defendant here.

On August 18, 1972, Ronald Clark entered into a memorandum agreement with the Oregon State Council of Carpenters and the Southwestern Washington District Council of Carpenters (unions). On August 9, 1977, Richard Clark entered a similar agreement with the same unions. Both agreements bind the defendants to comply with the terms of the "Carpenters Master Labor Agreement for Oregon and Southwest Washington", which established various pension and other fringe benefit trusts for union carpenters. Thus, these two "prehire" agreements obligated defendants to make contributions to the various trusts on behalf of the carpenters working for them.

In August and September, 1977, the unions represented a majority of the carpenter employees at Richard Clark's Hilltop Road project in Multnomah County. Other than for the Hilltop Road project, there is no evidence that defendants have ever used union labor.

Between December, 1978 and May, 1979, Richard Clark and Ronald Clark performed work on the Thunderbird Motor Inn project in Coos Bay, Oregon, where R. C. R. was the general contractor. They hired five carpenters, none of whom were members of the unions involved here.

Plaintiffs are the trustees of the union fringe benefit trusts. They bring this action, pursuant to the prehire agreements, to collect contributions on behalf of the carpenters hired by defendants for the work on the Coos Bay project between December 1, 1978 and May 31, 1979, inclusive. Defendants made no such contributions. Rather, defendants contest whether they were legally required to make the contributions, notwithstanding the prehire contracts.

NLRB v. Local Union No. 103, 434 U.S. 335 (1978), provides guidance. There, the employer and the union entered into a prehire agreement obligating the employer to abide by a larger multi-employer agreement. The employer used nonunion labor on a construction project and the union picketed it for violation of the prehire agreement. The employer filed a charge with the NLRB that the union was violating the National Labor Relations Act (Act) by picketing to attempt to force the employer to recognize the union. The Board found for the employer, and the Supreme Court agreed.

The Supreme Court had to determine whether the agreement was enforceable. The Court noted the general rule that, under §7 of the Act, a union cannot purport to act on behalf of all of a group of employees unless a majority of the employees have chosen that

union as their representative.

Thus:

> "both union and employer commit unfair practices when they sign a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests."

Id. at 344. The Act, however, provides a narrow exception to this general rule. Section 8 (f) provides that the execution of an agreement with a minority union is not an unfair labor practice if the employer is in the construction industry. But this exception does not mean the agreement is therefore enforceable. To the contrary,

> "a 'prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship.' *Ruttmann Construction Co.*, 191 N.L.R.B. 701, 702 (1971). The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites."

Id. at 345. The Supreme Court found this agreement to be unenforceable, and therefore the union was picketing illegally.

Plaintiffs argue the unions' prior majority status at the Hilltop Road project makes the prehire agreements operative for purposes of the Coos Bay project, notwithstanding the fact that the unions represented no employees at the latter. In *Dee Cee Floor Covering*, 232 N.L.R.B. 421, 97 LRRM 1072 (1977), the Board considered and rejected the same argument. There, the employer entered into a prehire agreement and may have used a majority of union employees on a number of jobsites. The employer then used nonunion labor on a project, and the trustees of the fringe benefit trusts sued for contributions under the prehire agreement. The Board found for the employer, holding:

> "Furthermore, the mere fact that the Union might indeed have represented a majority of the employees at Respondent Dee Cee's previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite. . ."

Id. at 1073. In *R. J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), the Board was considering competing claims of minority

unions on separate §8 (f) contracts. It rejected a rule that would give an irrebuttable presumption of majority status to a union once it had majority status with an employer. Rather, the Board said that a rebuttable presumption would arise if there was one-time majority status and there was a union security clause that was enforced. This rule was given implicit approval by the Supreme Court in *Local Union No. 103, supra,* 434 U.S. at 351, n. 12. Here, there has been no enforcement of the union security agreement in the prehire contracts. Thus, I hold that the unions' majority status at the Hilltop Road project has no effect on the Coos Bay project.

Plaintiffs argue that the NLRB has exclusive jurisdiction of the question here and that the defense is barred by the statute of limitations. Both these arguments are premised on the involvement of an unfair labor practice. There has been no unfair labor practice here. The entering of the agreement is not, of itself, an unfair labor practice because of the exception provided by §8 (f). The sole issue is the enforceability of the agreement. Moreover, the Supreme Court said, in *Local Union No. 103, supra:*

> "(I)n *Retail Clerks v. Lion Dry Goods, Inc.,* 369 U.S. 17 (1962) . . . the Court's opinion recognizes that §301 of the Labor Management Relations Act confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority-designated collective-bargaining agents. Section 8 (f) contracts were noted as being in this category.

Id. at 351. The action here is brought under §301 for enforcement of the disputed agreement by the trustees of a §302 trust fund.

Plaintiffs also argue that the prehire agreements are voidable, and thus effective until action is taken to void them. Here, defendants took no affirmative action to repudiate the agreements until their attorney gave notice to cancel the agreements effective May 31, 1979. Plaintiffs rely on language in *Local Union No. 103, supra* at 341, describing the prehire agreement as "voidable". The context in which the word was used and the opinion as a whole compel the conclusion that the Court did not hold, as plaintiffs argue, that a prehire agreement is enforceable, regardless of lack of majority status, until affirmative action is taken to repudiate it. I read the case as clearly stating majority status is a condition *precedent* to the enforceability of a prehire agreement. *Trust Fund v. McDowell,*

103 LRRM 2219 (W. D. Wash. 1979) and *Trust Fund v. Megahee*, 102 LRRM 2740 (M. D. Fla. 1979) appear to be at odds with each other on this issue. Between the two, I feel *McDowell* is the better decision.

In conclusion, defendants shall prevail. The prehire agreements are unenforceable against defendants with regard to the Coos Bay project, notwithstanding the unions' majority status on the prior Hilltop Road project.

In reaching this decision, I found it unnecessary to consider defendants' proposed reply memorandum. Defendant motion for leave to file their reply memorandum is denied.

The defendants may move for an award of attorney fees, and a hearing will be scheduled if either party so wishes.

The foregoing shall constitute findings of fact and conclusions of law pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure.

Dated this _____ day of August, 1980.

United States District Judge

APPENDIX "C"

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor orgainization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer. .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents . . .

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformily required as a condition of acquiring or retaining membership; . . .

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representa-

tive of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act.

(B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) than an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b). . . .

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of

employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section (9) (c) or 9 (e).*

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. . . . .

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302 (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or ememployee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of em-

ployees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization. . . . .

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization; *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their

families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* that no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause

(b) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* that the requirements or clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* that no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers of agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959: or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5 (b) of the Labor Management Cooperation Act of 1978. . . . .

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

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Opposition

Office - Supreme Court, U.S.
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No. 81-1946

In The
Supreme Court of the United States
October Term, 1981

RICHARD D. CLARK, d/b/a RICHARD CLARK CONSTRUCTION, RONALD L. CLARK, d/b/a RONALD CLARK CONSTRUCTION CO., a/k/a R. C. R. CONSTRUCTION,

Petitioners,

vs.

RYCHEN PADDACK, ARTHUR J. DARLING, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, FRANK B. HASTIE, JR., V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare, Pension, and Vacation-Savings Trust Funds, and RYCHEN PADDACK, LEO GRIFFITHS, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, and RONALD L. ANDERSON, as Trustees for the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer, in an action brought solely by third party beneficiary employee benefit trust funds to collect retrospective delinquent contributions, may assert as a defense that its obligation to contribute is unenforceable because a majority of union members were not employed at the jobsite.

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No. 81-1946

In The

Supreme Court of the United States

October Term, 1981

RICHARD D. CLARK, d/b/a RICHARD CLARK CONSTRUCTION, RONALD L. CLARK, d/b/a RONALD CLARK CONSTRUCTION CO., a/k/a R. C. R. CONSTRUCTION,

Petitioners,

vs.

RYCHEN PADDACK, ARTHUR J. DARLING, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, FRANK B. HASTIE, JR., V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare, Pension, and Vacation-Savings Trust Funds, and RYCHEN PADDACK, LEO GRIFFITHS, HENRY HANNAN, DONALD C. STAUDENMIER, ROY COLES, CARL M. HALVORSON, V. A. HARDING, ALLEN RETTMANN and HAROLD HANSEN, and RONALD L. ANDERSON, as Trustees for the Oregon-Washington Carpenters-Employers Apprenticeship and Training Trust Fund,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Rychen Paddack, *et al.*, respectfully request that the Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on March 2, 1982, be denied, or the judgment be summarily affirmed.

STATEMENT OF THE CASE

Respondents are the trustees of the Oregon-Washington Carpenters-Employers Health & Welfare, Pension, Apprenticeship & Training and Vacation-Savings Trust Funds. These funds are joint labor management employee fringe benefit trust funds created pursuant to Section 302 (c) (5) of the Labor Management Relations Act, 29 U. S. C. § 186 (c) (5). The Petitioners are engaged in the building and construction industry as general contractors.

On August 18, 1972, Petitioner Ronald L. Clark entered into a short form collective bargaining compliance agreement (hereinafter "Memorandum Agreement"), with the Oregon State Council of Carpenters and Southwest Washington District Council of Carpenters and their affiliated local unions. This agreement obligated this Petitioner to conform to the provisions of a more comprehensive collective bargaining agreement known as the Carpenter's Master Labor Agreement (hereinafter "Master Agreement"), generally providing for the wages, hours and working conditions of those persons providing carpenter type labor. The Memorandum Agreement further obligated this Petitioner to comply with the terms of the agreements creating and governing the various employee benefit trust funds for which Respondents act as trustees and specifically incorporated the Master Agreement and the trust agreements by reference. Respondents are therefore third party beneficiaries to the Master Agreements, Memorandum Agreement and the trust agreements.

The Memorandum Agreement further provided that it was binding upon the signator, "regardless of a change

of entity, name or association or joint venture, and shall bind any entity or venture who is a principal associated with the employer." The Memorandum Agreement was, by its terms, effective from year to year until either party gave written notice of termination or modification at least 60 days prior to May 31 of any given year. The Master Labor Agreement contained a union security clause and further obligated the employer to hire persons to perform work under coverage of the agreement from the out-of-work list maintained at the union hiring hall.

Both the Master Agreement and the trust agreements obligated the signatory employer to pay into the trust funds a specified sum for each compensable hour worked by the covered carpenter employees. The trust agreements further provided for auditor's fees, attorney's fees and other costs in the event of the necessity for legal action, including all appellate proceedings.

Subsequent to the execution of the Memorandum Agreement, Petitioner Ronald L. Clark began work on a structure located at Hilltop Road in Portland, Oregon. Pursuant to the agreements, Petitioner hired persons from the out-of-work list maintained at the hiring hall and paid employee fringe benefit contributions on all carpenter employees from the date of the signing of the agreement until the completion of the project.

On August 9, 1977, Richard D. Clark signed a Memorandum Agreement on behalf of himself personally and Richard Clark Construction, also known as R. C. R. Construction, a general contracting partnership in which Richard Clark, Ronald Clark and Charles Clark were principals. The Petitioners then began work as a gen-

eral contractor for the Thunderbird Motor Inn project located in Coos Bay, Oregon. The Memorandum Agreement signed by Richard D. Clark was identical in terms to the one signed by Ronald Clark in 1972. However, the Petitioners failed to comply with the agreement to hire workers from the out-of-work list maintained at the hiring hall.

During the period beginning December 1, 1978 and ending May 31, 1979, a total of 3565 hours of carpenter type labor were expended by the Petitioner's employees on the Thunderbird project. The required employee benefit contributions corresponding to those hours were not paid by the Petitioners.

Respondent brought this action in order to recover certain unpaid employee fringe benefit contributions, contractual liquidated damages, contractual interest charges, contractual auditor's fees and contractual attorney's fees for work performed during the duration of the Thunderbird project.

In a letter dated March 6, 1979, Petitioners cancelled their agreement with the Union pursuant to its terms, effective May 31, 1979. The Petitioners made no effort of any kind to cancel, terminate or otherwise modify the agreements herein mentioned prior to that time.

The complaint in this matter was initially filed in April, 1979 in the Circuit Court of the State of Oregon in and for the County of Multnomah, pursuant to Section 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a). The Petitioners removed the case to the United States District Court for the District of Oregon pursuant to 28 U. S. C. § 1441. The Petitioners answered the complaint, *inter alia*, by pleading an affirmative defense based

on the allegation that the agreements were unenforceable because a majority of union members were not employed at the jobsite.

In May, 1980, Petitioners moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. On August 12, 1980, the United States District Court rendered its decision granting Petitioner's Motion for Summary Judgment and entering judgment dismissing Respondent's action. Respondents appealed from this judgment on August 29, 1980. On March 2, 1982, the Court of Appeals for the Ninth Circuit rendered its decision reversing the ruling of the United States District Court.

ARGUMENT

Petitioners strive to create the appearance of great confusion among the lower courts as to the effect on an employer's contractual obligations of this Court's decision in *NLRB v. Iron Workers*, 434 U. S. 335 (hereafter "*Higdon*"). But Petitioners could prevail neither under the reading of *Higdon* by the Ninth Circuit (that a pre-hire agreement is voidable until the union obtains a majority, but enforceable under § 301 until it has been repudiated)[1] nor under the view expressed by some other courts that "*Higdon* is only applicable to unfair labor practice cases, and in cases such as this one, brought by trustees of fringe benefit funds for back payments, Sec. 8(f) agreements are

1 The Ninth Circuit adopted this view in *Todd v. Jim McNeff, Inc.*, 667 F. 2d 800, 803-804 and followed it herein (Petitioners' Appendix A, page 15).

fully enforceable under all circumstances." See *Todd v. Jim McNeff, Inc.*, 667 F. 2d 800, 802 (9th Cir.)[2]

The only Court of Appeals whose view of *Higdon* would support Petitioners' failure to make payments to the fringe benefit funds as they had agreed is that of the Fifth Circuit in *Baton Rouge Bldg. & Const. v. E. C. Schafer Const.*, 652 F. 2d 806. The existence of this one appellate decision supporting Petitioners' position might have raised a sufficiently significant conflict to warrant this Court's attention if all other things were equal. But other things are not equal. Congress in § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, added § 515 to ERISA, which provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement." 29 U. S. C. A. § 1145 (West Supp. 1981).

Review of the judgment below is unwarranted for two reasons: (1) The new § 515 of ERISA largely deprives the disagreement over *Higdon* of significance; (2) even if the *Higdon* issue were resolved in Petitioners'

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2 This was the view of the Tenth Circuit in *New Mexico District Council of Carpenters v. The Mayhew Co.*, 664 F. 2d 215 and of the Eighth Circuit in *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Assoc. Wrecking Co.*, 638 F. 2d 1128. In a subsequent case, *W. C. James, Inc. v. Oil Chemical, Etc.*, 646 F. 2d 1292, the Eighth Circuit declined to enforce prospectively a pre-hire agreement which "had never been operable" (*Id.* at 1295, n. 4).

favor, the judgment below would stand unless § 515 were given only prospective effect, contrary to "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U. S. 696, 711.

Respondents relied on § 515 as an alternative ground for decision in the Court of Appeals. This provision was not discussed, however, since the Court of Appeals' decision in Respondents' favor was required by its own precedent in *Todd, supra*.[3] We submit that if certiorari is not denied, Respondents' entitlement to judgment under § 515 is so clear as to warrant summary affirmance by this Court.

1. While the language of § 515 of ERISA would permit the conclusion that all defenses of illegality are barred in suits for contributions by employee benefit funds, that broad interpretation was rejected by a majority of the court in *Kaiser Steel Corp. v. Mullins*, — U. S. —, 102 S. Ct. 851 (Jan. 13, 1982). But the legislative history makes clear that at the very least, Congress intended to preclude the defenses which Petitioners assert here—that the agreement pursuant to which the payments are due

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3 Under these circumstances the Court may consider that the omission of any reference to § 515 in the Petition for Certiorari brings into play this Court's Rule 21.5:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

was entered into by a union which did not represent a majority of the employees. In *Kaiser*, this Court described the legislative history of this provision as follows:

> The provision which was eventually enacted as § 306 (a) was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Staff of the Senate Comm. on Labor and Human Resources, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. 44 (unnumbered Comm. Print April 1980) (1980 Senate Labor Comm. Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of § 306(a) in the same language used in the Senate Labor Committee Print. Both Congressmen also stated that they endorsed cases such as *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, 80 S. Ct. 489, 4 L. Ed. 2d 442 (1960); *Huge v. Long's Hauling Co., Inc.*, 590 F. 2d 457 (CA3 1978), *cert denied*, 442 U. S. 918, 99 S. Ct. 2840, 61 L. Ed. 2d 285 (1979); *Lewis v. Mill Ridge Coals, Inc.*, 298 F. 2d 552 (CA6 1962); and disapproved cases such as *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (DC 1980), *appeal pending*, and *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, 103 L. R. R. M. 2219 (WD Wash. 1979), *appeal pending* (CA9 No. 80-3024).
>
> [102 S. Ct. at 862, footnotes omitted.]

The two decisions which were expressly disapproved as "incorrectly decided" and legislatively overruled had

both adopted the view that by virtue of *Higdon* employee benefit trust funds may not enforce a pre-hire agreement where the union which made the agreement did not represent the majority of employees. Thus, whatever may be the effect of § 515 on the defense of illegality in other contexts, it clearly resolves the *Higdon* issue against Petitioners' position.[4]

Since Congress has now spoken, the conflict in circuits as to the enforceability of pre-hire agreements in § 301 suits is no longer of sufficient importance to warrant this Court's attention. The vast majority of the cases in which the *Higdon* defense has been raised have been brought on behalf of trust funds, as in this case. We do not know how many such suits are presently outstanding, but it is unlikely that there number is sufficiently great to warrant this Court's attention.[5]

2. The enactment of § 515 not only renders the questions presented largely academic but virtually eliminates Petitioners' chance of ultimately succeeding in this action. For even if the *Higdon* issue were decided in their favor, Petitioners could avoid liability to Respond-

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4 Given the court's reasoning in rejecting the applicability of the 1980 Act in *Kaiser,* we stress that Petitioners do not argue that the clauses requiring the contributions to the benefit funds are themselves illegal. Compare 102 S. Ct. at 861-862.

5 The burden of establishing that a case is of sufficient importance to warrant review by this Court is, of course, on the Petitioners. Yet the Petition for Certiorari makes no showing that the questions presented retain their significance (because of the pendency of other similar actions, or for any other reason) despite the enactment of § 515 of ERISA.

ents only if the 1980 amendment to ERISA were deemed inapplicable. Since the liabilities herein arose before § 515 was added by the Multiemployer Pension Plan Amendments Act of 1980, the question is whether the Act should in this respect be given only prospective application. That question must be decided against Petitioners.

As we have stated earlier, the governing principle is "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (*Bradley v. Richmond School Board,* 416 U. S. 696, 711). The opinion in *Bradley* traced the origin and the justification for this rule to Chief Justice Marshall's words in *United States v. Schooner Peggy,* 1 Cranch 103, 110 (see 416 U. S. at 711-712). The *Bradley* court noted that *Schooner Peggy* left it "unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *Schooner Peggy,* or, conversely, whether such a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases. (*Id.* at 712-713, emphasis in original). The Court observed further that "in *Thorpe v. Housing Authority of the City of Durham,* 393 U. S. 269 (1969), the broader reading of *Schooner Peggy* was adopted, and this Court ruled that 'an appellate court must apply the law in effect at the time it renders its decision.' *Id.* at 281." (416 U. S. at 714). After describing *Thorpe,* the Court said that that case "thus stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pend-

ing cases, it is to be given recognition and effect." (*Id.* at 715). Accordingly, the Court "reject[ed] the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." (*Id.*) Rather, the party which would give the legislation only prospective effect has the burden of establishing that this was the legislative intent.

A reading of the legislative history of § 306(a) of the 1980 Act reveals no evidence whatsoever of that intent. What evidence there is points against a limited reading; a sponsor of the amendment explained that "the bill clarifies the law"[6] as opposed to changing it, and the amendment's overriding concern was for the financial stability of these employee benefit funds. See, *e. g.*, the quotations from the Staff Committee Report in the majority opinion in *Kaiser* quoted at p. 8, *supra*, and in the text and

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6 Mr. MATSUNAGA. If I may pose a further question, in some recent cases such as the Washington Area Carpenters Fund Overhead Door Co., a simple collection action brought by plan trustees has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?

Mr. WILLIAMS. I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.

Further, *plan participants* for whom the employer promises to make pension contributions to the plan in exchange for their labor *are entitled to rely on their employer's promises. The bill clarifies the law* in this regard by providing a direct ERISA cause of action against a delinquent employer, without regard to extraneous claims or defenses.

126 Cong. Rec. S10102 (daily ed., July 29, 1980). (Emphasis supplied.)

notes at notes 2 and 3 of the dissenting opinion, 102 S. Ct. at 864-865.

Bradley recognized also that the court in *Thorpe* had "observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision 'had been made to prevent manifest injustice,' citing *Greene v. United States*, 376 U. S. 149." (416 U. S. at 716-717). But Petitioners cannot invoke the "manifest injustice" exception because the equities are clearly on the side of Respondent funds and their beneficiaries. It would not lie in the mouths of Petitioners to assert that when they entered into these agreements and later when they obtained labor pursuant thereto they expected that they would not have to make the promised payments to the employee benefit funds. On the other hand, the workers who performed that labor justifiably expected that their labor would be recompensed in full, as promised, including the contributions on which their welfare, pension and other benefits depend.[7]

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied. Alternatively, the judgment below should be summarily affirmed on the authority of

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7 See, e. g., the reference to the employees' reliance in Sen. Williams' statement quoted in the previous footnote.

§ 515 of ERISA, which was added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980.

Respectfully submitted,

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